Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

SECOND DIVISION

LINDE PHILIPPINES, INC. (formerly CONSOLIDATED, INDUSTRIAL GASES, INC.),
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA Case No. 8724

Members:
CASTAÑEDA, JR., *Chairperson*
CASANOVA, *and*
COTANGCO-MANALASTAS, *JJ.*

Promulgated:

MAY 04 2016
3:15 p.m.

x--x

DECISION

CASANOVA, *J.*:

Before us is the Amended Petition for Review[1], filed on February 5, 2015, by petitioner Linde Philippines, Inc. (formerly, Consolidated Industrial Gases, Inc.) seeking the cancellation and withdrawal of the deficiency Income Tax and Value-Added Tax (VAT) assessments against it for the year 2009 in the total amount of ₱16,230,296.09; and refund, in the aggregate amount of ₱18,567,731.69, which petitioner allegedly paid under protest.

Petitioner Linde Philippines, Inc. is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with Securities and Exchange Commission (SEC) Company Registration No. 89492.[2] Petitioner's primary purpose is to engage in the manufacture, production, purchase, importation, sale and trade at wholesale of all kinds of liquids and gases and special gases and other chemicals, including but not limited to oxygen, hydrogen, acetylene, nitrogen, argon, carbon dioxide, carboxen, nitrous oxide, compressed air, helium and other allied or related products, including welding equipment, containers and other receptacles and to lease, operate and/or manage, construct and

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[1] Docket (Vol. VIII), pp. 3629-3666.
[2] Exhibit "P-1".

install for the account of others, plants, equipment and machineries for the manufacture or production of the desired liquids and gases and other billed products including pipeline systems and related equipment.[3]

Respondent is the Commissioner of Internal Revenue who is the officer duly appointed and empowered by law to act on national internal revenue tax assessments, with office address at the Bureau of Internal Revenue, National Office Building, Diliman, Quezon City.[4]

Petitioner filed its Quarterly VAT Returns (BIR Form No. 2550-Q) for CY 2009 on the following dates:

Tax Return	Date of Actual Filing
VAT 1st Quarter	April 28, 2009[5]
VAT 2nd Quarter	July 22, 2009[6]
VAT 3rd Quarter	October 21, 2009[7]
VAT 4th Quarter	January 22, 2010[8]

On June 21, 2011, petitioner received Letter of Notice (LN) No. 116-TRS-09-00-00036 from respondent informing petitioner that the alleged computerized line-by-line matching conducted by respondent on the information/data by withholding agents/payors and payees/ income recipients of the respondent's Tax Reconciliation System ("TRS") against petitioner's income and VAT return for taxable year 2009 yielded discrepancies.[9]

Petitioner received from respondent a second Letter of Notice dated February 9, 2012 in connection with Letter of Notice No. 116-TRS-09-00-00036 reiterating the alleged discrepancies stated in the first LN.[10]

On March 8, 2012, respondent received a letter dated March 5, 2012 from petitioner which acknowledged the receipt of the second

[3] Exhibit "P-1", Docket (Vol. I), p. 237.
[4] Par. 1.01, Joint Stipulation of Facts and Issues (JSFI), Docket (Vol. IV), p. 1805.
[5] Exhibit "P-13".
[6] Exhibit "P-16".
[7] Exhibit "P-19".
[8] Exhibit "P-22".
[9] Par. 12, Statement of Facts, Amended Petition for Review, Docket (Vol. VIII), p. 3632.
[10] Par. 13, Ibid.

Letter of Notice dated February 9, 2012 and disputed the findings of respondent therein.[11]

On June 20, 2012, petitioner received from respondent a letter dated June 18, 2012, requiring petitioner to make a reply or submit necessary records/documents to substantiate the alleged discrepancies noted by respondent in Letter of Notice No. 116-TRS-09-00-00036.[12]

On November 19, 2012, petitioner received from respondent a Notice of Informal Conference dated November 5, 2012.

On December 27, 2012, petitioner received from respondent an undated formal assessment notice (FAN) with attached detail of discrepancies assessing petitioner of deficiency income tax and value-added tax, including interest and compromise penalties in the aggregate amount of ₱46,589,889.54.[13]

On January 2, 2013, petitioner allegedly received from respondent the preliminary assessment notice (PAN) for the year 2009 directing petitioner to present in writing petitioner's side of the case within fifteen (15) days from receipt thereof.[14]

On January 25, 2013, petitioner filed a written protest to the FAN.

On October 2, 2013, petitioner received respondent's Final Decision on Disputed Assessment (FDDA) stating that petitioner is allegedly liable in the total amount of ₱16,230,296.09 representing deficiency income tax and value-added tax, inclusive of interest and compromise penalties[15], which were broken down as follows:

Kind of Tax	Basic Tax	Interest	Compromise Penalty	Total
Income Tax	₱ 3,870,305.03	₱ 2,714,631.94	₱ 25,000.00	₱ 6,609,936.97
VAT	5,464,093.13	4,106,265.99	50,000.00	9,620,359.11
Total	₱ 9,334,398.16	₱ 6,820,897.93	₱ 75,000.00	₱ 16,230,296.09

[11] Exhibit "P-4", BIR Records, p. 81.
[12] Par. 15, Statement of Facts, JSFI, Docket (Vol. VIII), p. 3632.
[13] Par. 17, Ibid.
[14] Par. 18, Id., p. 3633.
[15] Par. 20, Id.

On November 4, 2013, petitioner filed a Petition for Review[16] before the Court of Tax Appeals.

On January 14, 2014, respondent filed her Answer[17] which interposed the following special and affirmative defenses, to wit:

> "4. She reiterates and re-pleads the preceding paragraphs of this Answer as part of the Special and Affirmative Defenses.
>
> 5. Respondent observed both procedural and substantial due process in issuing the assessment subject of this case. The Notice of Informal Conference, Preliminary Assessment Notice, Formal Letter of Demand with Audit Result/ Assessment Notice and Final Decision on Disputed Assessment were chronologically issued in accordance with law, rules and jurisprudence.
>
>> 5.1 To repudiate petitioner's claim, the Preliminary Assessment Notice was sent to petitioner via registered mail on December 06, 2012 which is evidenced by a registry receipt with number 3715.
>>
>> 5.2 It is quite illogical for petitioner to assert that respondent failed to observe due process. Contrary to its claim that it was denied due process, it admitted in its own Petition for Review that it received the Preliminary Assessment Notice, Formal Letter of Demand and Final Decision on Disputed Assessment issued by respondent.
>>
>> 5.3 In respondents Preliminary Assessment Notice, petitioner was informed and notified of its deficiency tax assessments and was given the opportunity to dispute the said assessment.
>>
>> 5.4 Assuming without admitting that petitioner did not received the Preliminary Assessment Notice, Section 228 of the Tax

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[16] Docket (Vol. I), pp.14-46.
[17] Docket (Vol. I), pp. 171-178.

> Code clearly refers to the Final Assessment Notice that should be formally protested by the taxpayer; or else, the same becomes final and executory.

6. Likewise, petitioner was also informed of the factual and legal basis of the assessment. The Preliminary Assessment Notice, Formal Letter of Demand and Final Decision on Disputed Assessment indicated not only the deficiency taxes involved, compromise penalties and interest due thereon, but also sufficiently stated the facts, the law, rules and regulations on which the assessment is based.

7. The Revenue Officers performed comprehensive audit procedure and technique. Consequently, petitioner is liable to pay for deficiency Income Tax, Value-Added Tax and Compromise Penalty for taxable year 2009. The following is a summary of findings of the revenue examiner as a result of the investigation conducted, to wit:

I. DEFICIENCY INCOME TAX			
UNDECLARED SALES per AUDIT			
Line-by-line matching(schedule 5)		12,581,074.43	
Discrepancy on VAT & ITR (schedule 3)		319,942.32	
TOTAL UNDECLARED SALES per AUDIT			12,901,061.75
REGULAR RATE			30.00%
TAX DUE			3,870,305.03
ADD: DISALLOWED 2307 (schedule 6)			
TOTAL DEFICIENCY TAX			
ADD: PENALTIES			
SURCHARGES (25%)			
INTEREST (4.15.2010-10.15.2013)	70.14%	2,714,631.94	
COMPROMISE		25,000.00	2,739,631.94
TOTAL TAX DUE & DEMANDABLE			**6,609,936.97**

II. DEFICIENCY VALUE ADDED TAX			
GROSS SALES per ALPHALIST OF PAYORS (Schedule 5)			213,916,285.85
LESS: GROSS SALES per PAYEES RETURN (Linde) (schedule 5)			143,749,379.61
DISCREPANCY			70,166,906.24
LESS: TP'S AMOUNT per RECON (Schedule 5)			24,632,796.84
VARIANCE for FDDA			45,534,109.40
VAT RATE			12.00%
DEFICIENCY VAT			5,464,093.15
ADD: PENALTIES			
SURCHARGES (25%)			
INTEREST (1.25.2010-10.25.2013)	75.15%	4,106,265.99	

COMPROMISE		50,000.00	4,156,265.99
TOTAL VAT DUE & DEMANDABLE			**9,620,359.11**

7.1 Portions of the Details of Discrepancies attached to the Final Decision on Disputed Assessment is reiterated and incorporated herein, to wit:

7.1.1 Undeclared sales/revenues on goods and services

After thorough and careful evaluation of your protest, we are pleased to inform you that the result of investigation reduced the amount of our assessment. The total amount resulting in the audit findings was subjected to gross profit rate per RMO 13-12 and subjected to regular income tax rate of 30%. The following amounts were the result of our audit findings based on your submitted documents:

❖ Previous year's sale not in sales schedule for 2008	Php	11,243,778.04
❖ Sales to client with no supporting documents		3,330,165.74
❖ Sales the following year with no supporting documents		2,123,956.19
❖ Sales to non-client		28,836,209.20
❖ Total		45,534,109.40
❖ Discrepancy on VAT & ITR	Php	319,942.32

xxx xxx xxx

The foregoing audit findings were adjusted to taxable income and to value added tax to determine the correct amount of tax due and demandable pursuant to **Section 32 and Section 108 of the NIRC**.

xxx xxx xxx

The interest has been imposed pursuant to Section 249 (A) of the NIRC.

The compromise penalty has been imposed pursuant to Sec. 255 of the NIRC in relation to RMO 19-2007.

8. Respondent posits that, assessments are presumed correct and made in good faith. The taxpayer has the duty of proving otherwise. In the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed. Even an assessment based on estimates is *prima facie* valid and lawful where it does not appear to have been arrived at arbitrarily or capriciously. **(Marcos II vs. Court of Appeals G.R. No. 120880 June 5, 1997)**

9. The burden of proof is on the taxpayer contesting the validity or correctness of an assessment to prove not only that the Commissioner of Internal Revenue is wrong but the taxpayer is right. Otherwise the presumption of correctness of tax assessment stands **(Commissioner of Internal Revenue vs. Hantex Trading Co. Inc, G.R No. 136975, March 31, 2005).** The presumption in favor of the correctness of tax assessment stands where evidence to the contrary is wanting. Hence, the

assessment issued against petitioner is imbued with factual and legal bases.

10. All presumptions are in favor of the correctness of tax assessments (*Sy Po vs. Court of tax Appeals, 164 SCRA 524)*. Dereliction on the part of petitioner to satisfactorily overcome the presumption of regularity and correctness of the assessment will justify the judicial upholding of said assessment notice.

11. Moreover, petitioner's contention that the assessment for deficiency VAT for the first, second and third quarter of taxable year 2009 is barred by prescription is untenable. Petitioner under declared its sales/ revenue on goods and services which was verified by the revenue officer from documents and related data. Further, a line by line matching of data filed by taxpayer and the data from Tax Reconciliation System resulted in under declaration of sales/ income which resulted in a false return.

12. Section 222 of the Tax Code provides that:

> 'SEC. 222. Exceptions as to Period of Limitation of Assessment and Collection of Taxes. -
>
> (a.) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission: xxx

13. The under declaration of petitioner of its sales/ income for taxable year 2009 resulted in filing a false return which is assessed within ten (10) years from discovery.

14. As decreed by the Honorable Supreme Court:

> 'Tax assessments by tax examiners are presumed correct and made in good faith.

> The taxpayer has the duty to prove otherwise. In the absence of proof of any irregularities in the performance of duties, an assessment duly made by a Bureau of Internal Revenue examiner and approved by his superior officers will not be disturbed. All presumptions are in favor of the correctness of tax assessments.'

On February 5, 2014, petitioner filed a Reply[18], raising, among others, the following contentions:

1. The respondent's failure to serve the PAN to petitioner as required by Section 228 of the Tax Code and in the manner provided in Section 3 of Revenue Regulations No. 12-199 effectively denied petitioner procedural due process rendering the assessment void.

2. The assessment for deficiency VAT is barred by prescription pursuant to Section 203 of the NIRC of 1997 and considering the provisions of Section 222 (A) of the NIRC of 1997 is not applicable to the case at hand.

3. Petitioner has shown clear and convincing proof that the assessment was without basis in fact and law.

The case was set for Pre-Trial Conference on February 27, 2014.[19] Accordingly, petitioner's Pre-Trial Brief[20] and respondent's Pre-Trial Brief[21] were both filed on February 24, 2014.

On March 19, 2014, the parties filed their Joint Stipulation of Facts and Issues,[22] which was approved by the Court in the Pre-Trial Order[23] dated March 24, 2014.

Trial ensued. Petitioner presented as its witnesses Elizabeth J. Ormillon, Aurora R. Silvestre, Arlene L. Bernales, Atty. Ma. Carmencita C. Ambrocio and Rizalyn C. Umali.

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[18] Docket (Vol. I), pp. 180-188.
[19] Notice of Pre-Trial Conference, Docket (Vol. I), p. 179.
[20] Docket (Vol. IV), pp. 1767-1780.
[21] Docket (Vol. IV), pp. 1781-1788.
[22] Docket (Vol. IV), pp. 1805-1817.
[23] Docket (Vol. IV), pp. 1819-1826.

On July 17, 2014, petitioner filed via registered mail its Formal Offer of Documentary Evidence[24] which was received by the Court on July 23, 2014.

In a Resolution[25] promulgated on September 9, 2014, the Court admitted as evidence for the petitioner Exhibits "P-1" to "P-23, "P-24" to "P-31", "P-32", "P-33" to "P-37", "P-38" to "P-40", "P-40-a" to "P-40-i", "P-41" to "P-63-a"; and denied Exhibits "P-24-a" and "P-33-a" for failure of petitioner to have the said exhibits identified.

Respondent, for her part, presented her lone witness Mr. Miguel C. Sulit. Thereafter, respondent filed her Formal Offer of Documentary Evidence[26] on October 9, 2014.

In a Resolution[27] promulgated on November 17, 2014, the Court admitted as evidence for the respondent Exhibits "R-1" to "R-16-a".

Petitioner filed its Memorandum[28] through registered mail on December 22, 2014, which was received by the Court on January 7, 2015.

On January 8, 2015 petitioner allegedly paid the amount of ₱7,579,103.77 representing the alleged deficiency income tax;[29] and ₱10,988,627.92 representing the alleged deficiency value-added tax[30], for the taxable period ending December 31, 2009.

On January 21, 2015, petitioner filed with respondent a written protest letter requesting for a tax refund or credit in the aggregate amount of ₱18,567,731.69 representing the alleged deficiency income tax and value added tax that petitioner allegedly paid. The protest letter avers, among others, that the said amount was erroneously and illegally collected from petitioner.[31]

[24] Docket (Vol. V), pp. 2016-2030.
[25] Docket (Vol. VIII), pp. 3367-3368.
[26] Docket (Vol. VIII), pp. 3387-3398.
[27] Docket (Vol. VIII), pp. 3411-3412.
[28] Docket (Vol. VIII), pp. 3418-3478.
[29] Exhibit "P-64-b".
[30] Exhibit "P-64-e".
[31] Exhibit "P-69".

On February 5, 2015, petitioner filed a Motion for Leave to File Amended Petition (with Motion for Leave to Present Additional Evidence)[32] with attached Amended Petition for Review.

On March 9, 2015, respondent filed, through registered mail its Comment (Re: Motion for Leave to File Amended Petition [with Motion for Leave to Present Additional Evidence dated February 3, 2015])[33], which was received by the Court on March 20, 2015.

In a Resolution[34] promulgated on March 27, 2015, the Court granted petitioner's Motion for Leave to File Amended Petition (with Motion for Leave to Present Additional Evidence). Accordingly, the Court admitted the attached Amended Petition for Review and required petitioner to pay the additional docket fees in the amount of ₱23,603.70.

Petitioner filed its Compliance[35] on April 10, 2015, which was noted by the Court in a Resolution[36] promulgated on April 16, 2015.

On April 27, 2015, respondent filed its Motion for Reconsideration (Re: Resolution Promulgated 27 March 2015)[37], with petitioner's Comment/Opposition (To Respondent's Motion for Reconsideration Dated 24 April 2015)[38] filed on May 14, 2015.

In a Resolution[39] promulgated on May 26, 2015, the Court denied respondent's Motion for Reconsideration (Re: Resolution Promulgated 27 March 2015).

On June 19, 2015, respondent filed her Amended Answer,[40] which interposed the following special and affirmative defenses, thus:

> "4. She reiterates and re-pleads the preceding paragraphs of this Answer as part of her Special and Affirmative Defenses:

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[32] Docket (Vol. VIII) pp. 3485-3493.
[33] Docket (Vol. VIII), pp. 3927-3935.
[34] Docket (Vol. VIII), pp. 3937-3943.
[35] Docket (Vol. VIII), pp. 3959-3963.
[36] Docket (Vol. IX), pp. 3968.
[37] Docket (Vol. IX), pp. 3974-3983.
[38] Docket (Vol. IX), pp. 4142-4149.
[39] Docket (Vol. IX), pp. 4155-4156.
[40] Docket (Vol. IX), pp. 4157-4169.

RESPONDENT OBSERVED BOTH PROCEDURAL AND SUBSTANTIAL DUE PROCESS IN ISSUING THE ASSESSMENT.

5. Respondent observed both procedural and substantial due process in issuing the assessment subject of this case. The Notice of Informal Conference, Preliminary Assessment Notice, Formal Letter of Demand with Audit Result/ Assessment Notice and Final Decision on Disputed Assessment were chronologically issued in accordance with law, rules and jurisprudence.

5.1 To repudiate petitioner's claim, the Preliminary Assessment Notice was sent to petitioner via registered mail on December 06, 2012 which is evidenced by a registry receipt with number 3715.

5.2 It is quite illogical for petitioner to assert that respondent failed to observe due process. Contrary to its claim that it was denied due process, it admitted in its own Petition for Review that it received the Preliminary Assessment Notice, Formal Letter of Demand and Final Decision on Disputed Assessment issued by respondent.

5.3 In respondents Preliminary Assessment Notice, petitioner was informed and notified of its deficiency tax assessments and was given the opportunity to dispute the said assessment.

5.4 Assuming without admitting that petitioner did not received the Preliminary Assessment Notice, Section 228 of the Tax Code clearly refers to the Final Assessment Notice that should be formally protested by the taxpayer; or else, the same becomes final and executory.

THE ASSESSMENT ISSUED AGAINST PETITIONER IS VALID AND LAWFUL.

6. Respondent posits that, assessments are presumed correct and made in good faith. The taxpayer has the duty of proving otherwise. In the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed. Even an assessment based on estimates is *prima facie* valid and lawful where it does not appear to have been arrived at arbitrarily or capriciously. **(Marcos II vs. Court of Appeals G.R. No. 120880 June 5, 1997)**

7. The burden of proof is on the taxpayer contesting the validity or correctness of an assessment to prove not only that the Commissioner of Internal Revenue is wrong but the taxpayer is right. Otherwise the presumption of correctness of tax assessment stands **(Commissioner of Internal Revenue vs. Hantex Trading Co. Inc, G.R No. 136975, March 31, 2005).** The presumption in favor of the correctness of tax assessment stands where evidence to the contrary is wanting. Hence, the assessment issued against petitioner is imbued with factual and legal bases.

8. All presumptions are in favor of the correctness of tax assessments (*Sy Po vs. Court of tax Appeals, 164 SCRA 524).* Dereliction on the part of petitioner to satisfactorily overcome the presumption of regularity and correctness of the assessment will justify the judicial upholding of said assessment notice.

THE ASSESSMENT ISSUED AGAINST PETITIONER HAS LEGAL AND FACTUAL BASES.

9. Petitioner was informed of the factual and legal basis of the assessment. The Preliminary Assessment Notice, Formal Letter of Demand and Final Decision on Disputed Assessment indicated not only the deficiency taxes involved, compromise penalties and interest due thereon, but also sufficiently stated the facts, the law, rules and regulations on which the assessment is based.

10. The Revenue Officers performed comprehensive audit procedure and technique. Consequently, petitioner is liable to pay for deficiency Income Tax, Value-Added tax and Compromise Penalty for taxable year 2009. The

following is a summary of the findings of the revenue examiner as a result of the investigation conducted, to wit:

I. DEFICIENCY INCOME TAX			
UNDECLARED SALES per AUDIT			
Line-by-line matching(schedule 5)		12,581,074.43	
Discrepancy on VAT & ITR (schedule 3)		319,942.32	
TOTAL UNDECLARED SALES per AUDIT			12,901,061.75
REGULAR RATE			30.00%
TAX DUE			3,870,305.03
ADD: DISALLOWED 2307 (schedule 6)			
TOTAL DEFICIENCY TAX			
ADD: PENALTIES			
SURCHARGES (25%)			
INTEREST (4.15.2010-10.15.2013)	70.14%	2,714,631.94	
COMPROMISE		25,000.00	2,739,631.94
TOTAL TAX DUE & DEMANDABLE			**6,609,936.97**

II.DEFICIENCY VALUE ADDED TAX			
GROSS SALES per ALPHALIST OF PAYORS (SCHEDULE 5)			213,916,285.85
LESS: GROSS SALES per PAYEES RETURN (Linde) (schedule 5)			143,749,379.61
DISCREPANCY			70,166,906.24
LESS: TP'S AMOUNT per RECON (schedule 5)			24,632,796.84
VARIANCE for FDDA			45,534,109.40
VAT RATE			12.00%
DEFICIENCY VAT			5,464,093.15
ADD: PENALTIES			
SURCHARGES (25%)			
INTEREST (1.25.2010-10.25.2013)	75.15%	4,106,265.99	
COMPROMISE		50,000.00	4,156,265.99
TOTAL VAT DUE & DEMANDABLE			**9,620,359.11**

10.1 Portion of the Details of Discrepancies attached to the Final Decision on Disputed Assessment is reiterated and incorporated herein, to wit:

10.1.1 Undeclared sales/revenues on goods and services

After thorough and careful evaluation of your protest, we are pleased to inform you that the result of investigation reduced the amount of our assessment. The total amount resulting in the audit findings was subjected to gross profit rate per RMO 13-12 and subjected to regular income tax rate of 30%. The following amounts were the result of our audit findings based on your submitted documents:

❖	Previous year's sale not in sales schedule for 2008	Php	11,243,778.04
❖	Sales to client with no supporting documents		3,330,165.74
❖	Sales the following year with no supporting documents		2,123,956.19
❖	Sales to non-client		28,836,209.20
❖	Total	Php	45,534,109.40
❖	Discrepancy on VAT & ITR	Php	319,942.32

xxx xxx xxx

> The foregoing audit findings were adjusted to taxable income and to value added tax to determine the correct amount of tax due and demandable pursuant to **Section 32 and Section 108 of the NIRC**.
>
> xxx xxx xxx
>
> The interest has been imposed pursuant to Section 249 (A) of the NIRC.
>
> The compromise penalty has been imposed pursuant to Sec. 255 of the NIRC in relation to RMO 19-2007.

11. As decreed by the Honorable Supreme Court:

> 'Tax assessments by tax examiners are presumed correct and made in good faith. The taxpayer has the duty to prove otherwise. In the absence of proof of any irregularities in the performance of duties, an assessment duly made by a Bureau of Internal Revenue examiner and approved by his superior officers will not be disturbed. All presumptions are in favor of the correctness of tax assessments.'

THE ASSESSMENT FOR DEFICIENCY VAT IS NOT BARRED BY PRESCRIPTION.

12. Moreover, petitioner's contention that the assessment for deficiency VAT for the first, second and third quarter of taxable year 2009 is barred by prescription is untenable. Petitioner under declared its sales/ revenue on goods and services which was verified by the revenue officer from documents and related data. Further, a line by line matching of data filed by taxpayer and the data from Tax Reconciliation System resulted in under declaration of sales/ income which resulted in a false return.

13. Section 222 of the Tax Code provides that:

> 'SEC. 222. Exception as to Period of Limitation of Assessment and Collection of Taxes. -
>
> (a.) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed

> without assessment at any time within ten (10) years after the discovery of the falsity, fraud or omission: xxx

14. The under declaration of petitioner of its sales/ income for taxable year 2009 resulted in filing a false return which is assessed within ten (10) years from discovery.

15. Thus, the assessment of deficiency VAT is not barred by prescription.

PETITIONER ERRONEOUSLY CONVERTED THE INSTANT CASE FROM AN ASSESSMENT TO A JUDICIAL CLAIM FOR REFUND.

16. Subsequently, petitioner filed an Amended Petition for Review converting the instant case from an assessment to a judicial claim for refund;

17. With all due respect, respondent disagrees to such conversion as discussed hereunder in seriatim.

18. Sections 204 and 229 of the NIRC of 1997, provides:

> 'SEC. 204. Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes. - The Commissioner may –
>
> xxx xxx xxx
>
> '(C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. **No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or**

> **penalty**: Provided, however, That a return filed showing an overpayment shall be considered as a written claim for credit or refund. (Emphasis and underscoring supplied)
>
> xxx xxx xxx
>
> 'SEC. 229. Recovery of Tax Erroneously or Illegally Collected. - **No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner**; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.
>
> In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: Provided, however, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid.' (Emphasis and underscoring supplied)

19. The aforesaid provisions are clear and categorical. A claim for refund must first be filed with the Commissioner before filing a suit or proceeding in any court for the recovery of tax alleged to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected.

20. In the instant case, it was the reverse. The instant petition was filed way back November 15, 2013 while the

alleged claim for refund was supposedly filed on January 21, 2015; thus, it would result in the absurd situation wherein the petition was first filed before the administrative claim for refund was filed with the Commissioner.

21. In consequence, respondent Commissioner in effect was not given the chance to act on the administrative claim for refund filed by petitioner; respondent Commissioner was deprived of the opportunity and time to study petitioner's claim for refund and to fully exercise its function. This is the very essence, the very substance of the doctrine of exhaustion of administrative remedies.

22. The doctrine of administrative remedies ensures an orderly procedure which favors a preliminary sifting process, particularly with respect to matters peculiarly within the competence of the administrative agency. After this sifting process comes the availability of judicial review of administrative decisions.

23. It is well settled rule in tax laws, that the taxpayer who feels aggrieved by the actions taken by tax authorities may not seek redress in the courts of justice without first exhausting available administrative remedies, except for certain well-recognized exceptions. It is the policy of the law and good practice to discourage court litigations and encourage resort to administrative action whenever the latter is feasible, adequate and speedy. (*Bagatsing vs. Ramirez, 74 SCRA 306)*

24. Moreover, the amendment altered the cause of action considering that the instant case was converted from an assessment to a judicial claim for refund; the amendment resulted in a radical change of the cause of action, theory, nature of the case and even the relief prayed for.

25. In relation thereto, the substantial change in the allegations prejudiced the rights of the respondent who already set up her Special and Affirmative Defenses in her previous Answer.

26. In the case of ***MARIA GULANG v. GENOVEVA NADAYAG, FELIX NADAYAG, ANTIPAS NADAYAG, ANDRES NADAYAG, HILARIO NADAYAG and HONORABLE COURT OF APPEALS,*** the Honorable Supreme Court held:

> 'Under Section 3 of Rule 10, substantial amendments may be made even after the case has been set for hearing provided prior leave of court is obtained. **Such leave may be refused if** the motion requesting for the same would delay the action or **the cause of action or defenses would be substantially altered by the proposed amendment.** This rule was correctly applied by the trial court.' (Emphasis and underscoring supplied)

27. Further, the amendment likewise resulted in delay considering that respondent already rested her case and the trial was already deemed terminated.

28. Section 3, Rule 10 of the Revised Rules of Court provides:

RULE 10

> **Section 3.** *Amendments by leave of court.* — Except as provided in the next preceding section, substantial amendments may be made only upon leave of court. **But such leave may be refused if it appears to the court that the motion was made with intent to delay**. Orders of the court upon the matters provided in this section shall be made upon motion filed in court, and after notice to the adverse party, and an opportunity to be heard. (Emphasis and Underscoring supplied)

29. In the case of *JOSE PENEYRA and MILAGROS CALDERON vs. HON. INTERMEDIATE APPELLATE COURT and HONORABLE GODOFREDO RILLORAZA*, the Honorable Supreme Court held:

> 'xxx **We rule that the amendment to include Corregidor College Inc. as additional defendant cannot be permitted inasmuch as the motion to amend was made only after petitioners had already rested their case** on February 20, 1981. We note the fact that it was only after a lapse of two (2) years and seven (7)

> months or on September 2, 1983 that petitioners filed their motion to amend their complaint. **To permit such amendment would obviously delay the proceedings of the trial court. Needless to say, at that point in the proceedings, substantial issues have already been joined**.
>
> **The rule is that amendments should be liberally allowed but this liberality at the outset of the action decreases as the case moves to its termination.** Besides, an application for leave to amend is ordinarily addressed to the sound discretion of the trial court and as a rule this discretion will not be disturbed on appeal except in case of an evident abuse thereof.' (Emphasis and underscoring supplied)

30. While it is true that the Rules of Court should be liberally construed, however, such liberal construction is not synonymous with complete disregard of the same especially if its total non-observance is to commit injustice to a litigant. **Rules of procedure exist for a purpose, and to disregard such rules in the guise of liberal construction would defeat such purpose. Procedural rules may not be ignored to suit the convenience of a party** (*United Pulp and Paper Co. vs. United Pulp and Paper Chapter-Federation of Free Workers, 426 SCRA 329)*.

31. In explaining the importance of faithful compliance with procedural rules, this Court held in *Land Bank of the Philippines vs. Natividad* that:

> '[P]rocedural rules are designed to facilitate the adjudication of cases. Courts and litigants alike are enjoined to abide strictly by the rules. While in certain instances, the Court allows a relaxation in the application of the rules, there is no intention to forge a weapon for erring litigants to violate the rules with impunity. The liberal interpretation and application of rules apply only in proper cases

> of demonstrable merit and under justifiable causes and circumstances. While it is true that litigation is not a game of technicalities, it is equally true that every case must be prosecuted in accordance with the prescribed procedure to ensure an orderly and speedy administration of justice. Party litigants and their counsel are well advised to abide by, rather than flaunt, procedural rules for these rules illumine the path of the law and rationalize the pursuit of justice.'

32. In Republic of the Philippines v. Sandiganbayan (fourth division), Jose L. Africa (substituted by his heirs), Manuel H. Nieto, Jr., Ferdinand E. Marcos (substituted by his heirs), Imelda R. Marcos, Ferdinand R. Marcos, Jr., Juan Ponce Enrile, and Potenciano Ilusorio (substituted by his heirs), G.R. No. 152375, December 16, 2011, the Highest Tribunal had occasion to pronounce:

> 'The above conclusions, contrary to petitioner's claim, are not only matters of technicality. Admittedly, rules of procedure involve technicality, to which we have applied the liberality that technical rules deserve. But the resolution of the issues raised goes beyond pure or mere technicalities as the preceding discussions show. They involve issues of due process and basic unfairness to the respondents, xxx They involved, too, principles upon which our rules of procedure are founded and which we cannot disregard without flirting with the violation of guaranteed substantive rights and without risking the disorder that these rules have sought to avert in the course of their evolution.'

ASSUMING ARGUENDO THAT PETITIONER CAN CONVERT THE INSTANT CASE FROM AN ASSESSMENT TO A JUDICIAL CLAIM FOR REFUND, PETITIONER MUST PROVE THAT IT IS ENTITLED TO A CLAIM FOR REFUND.

33. Taxes collected are presumed to be in accordance with laws and regulations.

34. Petitioner's alleged claim for refund is subject to administrative routinary investigation/examination by the Bureau of Internal Revenue. A claim for refund is not *ipso facto* granted because respondent CIR still has to investigate and ascertain the validity of the claim.

35. Taxes are essential to government's very existence; **(CIR vs. Solidbank Corporation, G.R. No. 148191, November 25, 2003)** hence, the dictum that 'taxes are the lifeblood of the government.' For this reason, the right of taxation cannot easily be surrendered; statutes granting tax exemptions are considered as a derogation of sovereign authority. **(CIR vs. Fortune Tobacco Corporation, G.R. Nos. 167274-75, July 21, 2008)** Since tax refunds are regarded as tax exemptions therefore, these are to be construed ***strictissimi juris*** against the person or entity claiming the exemption. **(Philippine Phospate Fertilizer Corporation vs. Commissioner of Internal Revenue G.R. 141973, June 28, 2005)**

36. In an action for refund, the burden of proof is on the taxpayer who claims the exemption and he must justify his claim by the clearest grant under the Constitutional or statutory law and cannot be permitted by vague implications **(BPI Leasing Corporation vs. Honorable Court of Appeals, G.R. No. 127624, November 18, 2003)** The taxpayer is charged with the heavy burden of proving that he has complied with and satisfied all the statutory and administrative requirements to be entitled to the tax refund. **(Commissioner of Intrernal Revenue vs. Eastern Telecommunications Philippines, Inc. G.R. No. 163835 July 7, 2010).**

37. Hence, there must be proof of compliance with the rules on tax recovery under Section 204(c) and Section 229 of the NIRC of 1997. Petitioner must file its administrative and judicial claims for refund or issuance of tax credit certificate within two (2) years from the date of payment of the tax.

38. Moreover, the amount of eighteen million five hundred sixty seven thousand seven hundred thirty one

pesos and 69/100 (Php 18,567,731.69) being claimed by petitioner arising from alleged payment under protest of deficiency assessment for taxable year 2009 is not properly documented.

39. In sum, petitioner must present clear and convincing evidence to merit a tax refund. The taxpayer bears the burden of establishing the factual and legal basis of its claim for refund

40. Time and again, it has been the constant rulings of the Supreme Court that claims for refund are construed strictly against the claimant for the same partake of the nature of exemption from taxation and as such, they are looked upon with disfavor. As such, they are regarded as in derogation of sovereign authority and to be construed *strictissimi juris* against the person or entity claiming the exemption. Petitioner fell short of proving the merit and veracity of its claim for refund."

On July 1, 2015, petitioner presented Elizabeth J. Ormilon as witness[41] in support of its Amended Petition for Review.

On July 6, 2015, petitioner filed its Reply (To Respondent's Amended Answer Dated 18 June 2015).[42]

Petitioner filed, through registered mail, its Formal Offer of Documentary Evidence (Re: Amended Petition)[43] on July 24, 2015 which was received by this Court on July 31, 2015.

In a Resolution[44] promulgated on September 28, 2015, the Court admitted as additional evidence for the petitioner Exhibits "P-64", "P-64-a", "P-64-b", "P-64-c", "P-64-d", "P-64-e", "P-65", "P-66", "P-67", "P-68", "P-69", "P-69-a", "P-69-b", "P-69-c", "P-70" and "P-70-a".

In a Resolution[45] promulgated on January 8, 2016, the instant case was submitted for decision, taking into consideration petitioner's

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[41] Minutes of Hearing, Docket (Vol. IX), p. 4171.
[42] Docket (Vol. IX), pp. 4172-4179.
[43] Docket (Vol. IX), pp. 4190-4195.
[44] Docket (Vol. IX), pp. 4199-4200.
[45] Docket (Vol. IX), pp. 4292.

Memorandum (Re Amended Petition)[46] filed on November 2, 2015, and respondent's Memorandum[47] filed on December 17, 2015.

On January 14, 2016, petitioner filed a Motion for Leave to File Reply Memorandum and to Admit Attached Reply Memorandum (Re Amended Petition)[48], which was granted by the Court in a Resolution[49] promulgated on January 19, 2016.

The parties agreed as to the issues to be resolved by the Court, to wit:

1. Whether or not respondent observed substantive and procedural due process before issuing the subject assessment against petitioner;

2. Whether or not the assessment for deficiency VAT against petitioner for the year 2009 is already barred by prescription pursuant to Section 203 of the NIRC of 1997;

3. Assuming, without conceding, that the issuance of the assessment is valid, whether or not such assessment for deficiency income tax and compromise penalties in the amount of Six Million Six Hundred Nine Thousand Nine Hundred Thirty Six and 97/100 Pesos (Php 6,609,936.97) is supported by facts and law.

4. Assuming, without conceding, that the issuance of the assessment is valid, whether or not petitioner is liable for deficiency VAT and compromise penalties in the amount of Nine Million Six Hundred Twenty Thousand Three Hundred Fifty Nine and 11/100 Pesos (Php 9,620,359.11).

5. Whether or not petitioner is liable for compromise penalties.

6. Whether or not petitioner is liable for deficiency income tax and compromise penalties in the amount of Six Million Six Hundred Nine Thousand Nine Hundred Thirty Six and 97/100 Pesos (Php 6,609,936.97) for fiscal calendar year 2009

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[46] Docket (Vol. IX), pp. 4206-4267.
[47] Docket (Vol. IX), pp. 4274-4290.
[48] Docket (Vol. IX), pp. 4299-4316.
[49] Docket (Vol. IX), p. 4319.

7. Whether or not petitioner is liable for deficiency VAT and compromise penalties in the amount of Nine Million Six Hundred Twenty Thousand Three Hundred Fifty Nine and 11/100 Pesos (Php 9,620,359.11).

In sum, the pivotal issues presented before us are: *first*, whether or not the assessments against petitioner for deficiency income tax and value-added tax for the year 2009 are valid; and *second*, whether or not petitioner's claim for tax refund is warranted under existing laws, rules and jurisprudence.

As to the first issue, petitioner posits that respondent did not comply with the requisites of substantive and procedural due process before assessing petitioner of deficiency taxes and compromise penalties on the basis of petitioner's receipt of the PAN after the FAN has been issued and respondent's failure to afford petitioner a chance to refute or respond to the same. Further, petitioner contends that the assessment for deficiency VAT for the year 2009 is barred by prescription. Also, petitioner avers that the assessment for deficiency income tax and VAT, as well as imposition of compromise penalties for the year 2009 is baseless and erroneous.

Respondent, on the other hand, avers that she observed both procedural and substantial due process in issuing the assessment; that the preliminary assessment notice, formal assessment notice and final decision on disputed assessment were received by petitioner; that petitioner was informed and notified of its deficiency tax assessments and was given the opportunity to dispute the same; that the deficiency VAT is not barred by prescription as the under declaration of petitioner of its sales/ income resulted in the filing of a false return which is assessed within 10 years from discovery.

We find for the petitioner.

Article III Section 1 of the Constitution provides that "No person shall be deprived of life, liberty, or property without due process of law xxx". In this regard, the law has provided the taxpayer with ample remedies to give him an opportunity to contest or dispute an assessment to which he is being made liable to pay.[50] This is

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[50] *BPI Data Systems Corporation (formerly Filipinas Management and Leasing Services, Inc.) vs. Commissioner of Internal Revenue*, CTA Case No. 4530, January 12, 1994.

provided for in Section 228 of the National Internal Revenue Code (NIRC), as amended, which reads:

> "SEC. 228. Protesting of Assessment. - **When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings**: Provided, however, That a preassessment notice shall not be required in the following cases:
>
> (a) When the finding for any deficiency tax is the result of mathematical error in the computation of the tax as appearing on the face of the return; or
>
> (b) When a discrepancy has been determined between the tax withheld and the amount actually remitted by the withholding agent; or
>
> (c) When a taxpayer who opted to claim a refund or tax credit of excess creditable withholding tax for a taxable period was determined to have carried over and automatically applied the same amount claimed against the estimated tax liabilities for the taxable quarter or quarters of the succeeding taxable year; or
>
> (d) When the excise tax due on excisable articles has not been paid; or
>
> (e) When an article locally purchased or imported by an exempt person, such as, but not limited to, vehicles, capital equipment, machineries and spare parts, has been sold, traded or transferred to non-exempt persons.
>
> The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void.
>
> **Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to said notice**. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings.

Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.

If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision, or from the lapse of the one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable." (emphasis supplied)

In relation thereto, Sections 3.1.2 and 3.1.4 of Revenue Regulations No. 12-99 requires the sending of PAN and FAN/FLD by CIR and the receipt thereof by the taxpayer as part of due process requirement in the issuance of a deficiency tax assessment, to wit:

"SECTION 3. **Due Process Requirement in the Issuance of a Deficiency Tax Assessment. —**

3.1 *Mode of procedures in the issuance of a deficiency tax assessment*:

xxx xxx xxx

3.1.2 *Preliminary Assessment Notice (PAN)*. — If after review and evaluation by the Assessment Division or by the Commissioner or his duly authorized representative, as the case may be, it is determined that there exists sufficient basis to assess the taxpayer for any deficiency tax or taxes, the said Office shall issue to the taxpayer, at least by registered mail, a Preliminary Assessment Notice (PAN) for the proposed assessment, showing in detail, the facts and the law, rules and regulations, or jurisprudence on which the proposed assessment is based (see illustration in ANNEX A hereof). **If the taxpayer fails to respond within fifteen (15) days from date of receipt of the PAN**, he shall be considered in default, in which case, a formal letter of demand and assessment notice shall be caused to be issued by the said Office, calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties.

xxx xxx xxx

3.1.4 *Formal Letter of Demand and Assessment Notice.* — The formal letter of demand and assessment notice shall be issued by the Commissioner or his duly authorized representative. The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based, otherwise, the formal letter of demand and assessment notice shall be void (see illustration in ANNEX B hereof). The same shall be sent to the taxpayer only by registered mail or by personal delivery. If sent by personal delivery, the taxpayer or his duly authorized representative shall acknowledge receipt thereof in the duplicate copy of the letter of demand, showing the following: (a) His name; (b) signature; (c) designation and authority to act for and in behalf of the taxpayer, if acknowledged received by a person other than the taxpayer himself; and (d) date of receipt thereof." (emphasis supplied)

It can be inferred from the foregoing that, if there exists a sufficient basis to assess the taxpayer of deficiency tax, a Pre-Assessment Notice shall be issued and sent to the taxpayer. The taxpayer is then given fifteen days to make a Reply and is also permitted to examine the records and present his arguments in writing. If the taxpayer fails to respond to the PAN, the taxpayer shall then be sent a Formal Letter of Demand and Assessment Notice, which shall state the facts and the law on which the assessment was based. The taxpayer may file a protest based on such assessment within thirty days. After filing the protest, the taxpayer must submit the relevant supporting documents within sixty days, otherwise the assessment shall become final.[51]

Worthy of emphasis is the fact that the provisions of Section 228 of the NIRC, as amended and Section 3 of RR No. 12-99 are

[51] *Puratos Philippines, Inc. vs. Commissioner of Internal Revenue*, CTA Case No. 6980, October 4, 2010.

couched in obligatory language by using the word "shall".[52] The term "shall" is a word of command, and one which has always or which must be given a compulsory meaning, and it is generally imperative or mandatory.[53] Where a statute is mandatory, the court has no power to distinguish between material and immaterial breach thereof or omission to comply what it requires. What the law decrees must be obeyed against pain of sanction or declaration of nullity of what is done in disregard thereof.[54] Thus, it is crucial that the procedure laid down in the said provisions of law and regulations be strictly enforced by respondent so as to safeguard petitioner's right to procedural due process.

Guided by the foregoing principles, the testimony of Elizabeth J. Ormillon would show that the PAN was received by petitioner on January 2, 2013, thus:

> "30. Q: Did Linde ever receive a PAN for the said alleged deficiency taxes?
>
> A: It was only on 2 January 2013 that Petitioner finally received the PAN directing it to present in writing its position paper within fifteen (15) days from receipt thereof."[55]

This fact is further strengthened by the testimony of Aurora R. Silvestre, to quote:

> "33. Q: Did Linde ever receive a PAN for the said alleged deficiency taxes?
>
> A: It was only on 2 January 2013 that Petitioner finally received the PAN directing it to present in writing its position paper within fifteen (15) days from receipt thereof."[56]

However, the undated FAN[57] was received by petitioner on December 27, 2012. As testified by Elizabeth J. Ormillon:

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[52] *CIR vs. United Salvage and Towage Philippines, Inc.*, G.R. No. 197515, July 2, 2014.
[53] *Enriquez, et al. vs. Enriquez, et al.*, G.R. No. 139303, August 25, 2005 citing *Lacson vs. Lacson*, G.R. No. L-23482, August 30, 1968.
[54] *Seriña vs. The Court of First Instance of Bukidnon, Ernesto Villalon*, G.R. No. L-28511, August 22, 1968.
[55] Exhibit "P-47".
[56] Exhibit "P-48".
[57] Exhibit "R-11".

> "26. Q: What happened after you received the Notice of Informal Conference dated 5 November 2012?
>
> A: On 27 December 2012, Linde received a Formal Assessment Notice ("FAN") issued by the BIR assessing it for alleged deficiency income tax, VAT and compromise penalties for the taxable year 2009 in the amount of Forty Six Million Five Hundred Eighty Nine Thousand Eight Hundred Eighty Nine and 54/100 Pesos (Php46,589,889.54)."[58]

This is further emphasized in the testimony of Elizabeth S. Ormilon to wit:

> "26. Q: What happened after you received the Notice of Informal Conference dated 5 November 2012?
>
> A: On 27 December 2012, Linde received a Formal Assessment Notice ("FAN") issued by the BIR assessing it for alleged deficiency income tax, VAT and compromise penalties for the taxable year 2009 in the amount of Forty Six Million Five Hundred Eighty Nine Thousand Eight Hundred Eighty Nine and 54/100 Pesos (Php46,589,889.54)."[59]

As may be gleaned from the foregoing testimonies and based on the pieces of evidence presented, petitioner received the PAN on January 2, 2013 while the FAN was received by petitioner on December 27, 2012 or six (6) days before it received the PAN. As clearly shown by the exchanges between petitioner's counsel and Ms. Silvestre:

> "ATTY. VALMONTE:
>
> Q. Ms. Witness, on Question No. 33, you mentioned that you received the PAN on January 2, 2013, is that correct?
>
> MS. SILVESTRE:
>
> A. Yes.

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[58] Exhibit "P-47".
[59] Exhibit "P-48".

ATTY. VALMONTE:

Q. On the other hand, you mentioned that you received the Final Assessment Notice on December 27, is that correct?

MS. SILVESTRE:

A. That's correct.

ATTY. VALMONTE:

Q. So, you received the Final Assessment Notice before you received the Preliminary Assessment Notice?

MS. SILVESTRE:

A. Correct."[60]

Since petitioner received the FAN prior to its receipt of the PAN, respondent clearly did not give petitioner a chance to file a response or reply to the PAN. Such failure on the part of respondent constitutes violation of Section 228 of the NIRC, as amended and Section 3 of RR No. 12-99.

In the case of Commissioner of Internal Revenue vs. Metro Star Superama, Inc.[61], the Supreme Court explained the importance of the sending of PAN to taxpayer in this wise:

> "From the provision quoted above, it is clear that the sending of a PAN to taxpayer to inform him of the assessment made is but part of the 'due process requirement in the issuance of a deficiency tax assessment', the absence of which renders nugatory any assessment made by the tax authorities. The use of the word 'shall' in subsection 3.1.2 describes that mandatory nature of the service of a PAN. The persuasiveness of the right to due process reaches both substantial and procedural rights and the failure of the CIR to strictly comply with the requirements laid down by law and its own rules is a denial of Metro Star's right to due process. xxx." (Underscoring ours)

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[60] TSN dated April 21, 2014, pp. 18-19.
[61] G.R. No. 185371, December 8, 2010.

The doctrine laid down in the foregoing case was reiterated by the Court *En Banc* in the recent case of *Commissioner of Internal Revenue vs. BPI-Philam Life Assurance Corporation.*[62]

We also emphasized in *Commissioner of Internal Revenue vs. Alpha Rigging & Moving Systems, Inc.,*[63] and Commissioner of Internal Revenue vs. Fabtech Export Industries, Inc.,[64] that the sending of PAN to a taxpayer is part of the due process requirement in the issuance of a deficiency tax assessment, thus, absence thereof or non-compliance with the mandatory provisions of Section 228 of the NIRC, as amended and Section 3 of RR 12-99 in the issuance of the same, renders nugatory any assessment made.

It may not also be amiss to state that, in the recent case of *Commissioner of Internal Revenue vs. Yumex Philippines Corporation,*[65] this Court has upheld the ruling that a taxpayer is deprived of its right to due process if the FAN is issue prior to the lapse of the 15-day period given to the taxpayer to reply/protest the PAN.

Based on the foregoing discussion, we hold that issuance of the PAN, save for certain instances, its receipt by the taxpayer and giving the taxpayer a chance to respond thereto should precede the issuance of the FAN. The process cannot be reversed. Thus, for failure of respondent to provide petitioner a chance to file a response or reply to the PAN, petitioner's right to procedural due process has been transgressed. Consequently, the assessments for deficiency income tax and VAT for the year 2009 issued by respondent against petitioner are void.

Having reached the foregoing conclusions, the Court need not delve into the other issues which are premised upon the validity of the assessments.

As to the second issue, we shall first address the propriety of the amendment made by petitioner on its petition for review.

Petitioner posits that the amendment of its petition for review is sanctioned under existing rules and jurisprudence. Petitioner asserts

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[62] CTA EB Case No. 1240 (CTA Case No. 8240), August 24, 2015.
[63] CTA EB Case No. 1076 (CTA Case No. 8135), January 8, 2015.
[64] CTA EB Case No. 1176 (CTA Case No. 8435), May 29, 2015.
[65] CTA EB Case No. 1139 (CTA Case No. 8331), August 11, 2015.

that the amendment of its petition for review did not substantially alter its cause of action as the amended petition for review utilized the same arguments and evidence; it merely added the additional fact that petitioner was constrained to pay the deficiency tax against it and seeks refund thereof. Finally, petitioner further asserts that said amendment did not cause delay; that it instead avoided multiplicity of suits.

Respondent counters that petitioner erroneously converted the instant case from an assessment to a judicial claim for refund; that the petitioner first sought a judicial claim for refund prior to its administrative claim; that the doctrine of exhaustion of administrative remedies has not been observed by petitioner; that the amendment caused by petitioner altered the cause of action, which is not sanctioned by existing rules;

We again find for the petitioner.

First, it bears stressing that when petitioner filed the petition for review on November 4, 2014, nowhere in the said petition can it be discerned that petitioner categorically prayed for the grant of a tax refund. Petitioner, in the said petition, only prayed to set aside the assessment for deficiency income tax and value-added tax; and, the cancellation and withdrawal of the assessments for compromise penalties.[66]

Contrary to respondent's assertion, on January 21, 2015, petitioner filed with respondent a written administrative protest[67] requesting the latter for a tax refund or credit of the allegedly erroneously and illegally collected deficiency income tax, VAT and compromise penalty in the aggregate amount of ₱18,567,731.69. Thereafter, petitioner's judicial claim was filed on February 5, 2015, through its Motion for Leave to File Amended Petition (with Motion for Leave to Present Additional Evidence)[68] with attached Amended Petition for Review.[69] It was only in the Amended Petition for Review that petitioner included an additional prayer for refund.[70] Thus, the administrative claim with respondent was filed ahead of petitioner's judicial claim. ex

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[66] Petition for Review, Docket (Vol. I), p. 42.
[67] Exhibit "P-69", Docket (Vol. IX), pp. 4013-4048.
[68] Docket (Vol. VIII), pp. 3485-3493.
[69] Docket, Vol. VIII, pp. 3629-3666.
[70] Docket, Vol. VIII, p. 3665.

Second, the present case falls under one of the exceptions to the doctrine of exhaustion of administrative remedies. In *Philip L. Go, Pacifico Q. Lim and Andrew Q. Lim vs. Distinction Properties Development and Construction, Inc.*[71], the High Court had the occasion to discuss the doctrine of exhaustion of administrative remedies and the exceptions relative thereto. To quote:

> "The doctrine of exhaustion of administrative remedies is a cornerstone of our judicial system. The thrust of the rule is that courts must allow administrative agencies to carry out their functions and discharge their responsibilities within the specialized areas of their respective competence. It has been held, however, that the doctrine of exhaustion of administrative remedies and the doctrine of primary jurisdiction are not ironclad rules. In the case of *Republic of the Philippines v. Lacap,* the Court enumerated the numerous exceptions to these rules, namely: (a) where there is estoppel on the part of the party invoking the doctrine; (b) where the challenged administrative act is patently illegal, amounting to lack of jurisdiction; (c) where there is unreasonable delay or official inaction that will irretrievably prejudice the complainant; (d) where the amount involved is relatively so small as to make the rule impractical and oppressive; (e) where the question involved is purely legal and will ultimately have to be decided by the courts of justice; (f) where judicial intervention is urgent; (g) where the application of the doctrine may cause great and irreparable damage; (h) **where the controverted acts violate due process**; (i) where the issue of non-exhaustion of administrative remedies has been rendered moot; (j) where there is no other plain, speedy and adequate remedy; (k) where strong public interest is involved; and (l) in quo warranto proceedings." (emphasis supplied, underscoring and citations omitted)

As discussed earlier, the act of respondent in not giving petitioner a chance to file a response or reply to the PAN constitutes violation of petitioner's right to procedural due process. Clearly, the instant case falls under one of the exceptions to the doctrine of exhaustion of administrative remedies.

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[71] G.R. No. 194024, April 25, 2012.

Third, an amendment which substantially changes a cause of action or defense is sanctioned by the present rules. Section 3 of Rule 10 of the Rules of Court reads:

> "**Section 3.** *Amendments by leave of court.* — Except as provided in the next preceding section, substantial amendments may be made only upon leave of court. But such leave may be refused if it appears to the court that the motion was made with intent to delay. Orders of the court upon the matters provided in this section shall be made upon motion filed in court, and after notice to the adverse party, and an opportunity to be heard."

Corollary thereto, in *Valenzuela, et al. vs. Honorable Court of Appeals, et al.*[72], the Supreme Court ruled:

> "Interestingly, Section 3, Rule 10 of the 1997 Rules of Civil Procedure amended the former rule in such manner that the phrase '*or that the cause of action or defense is substantially altered*' was stricken-off and not retained in the new rules. The clear import of such amendment in Section 3, Rule 10 is that under the new rules, 'the amendment may (now) substantially alter the cause of action or defense. This should only be true, however, when despite a substantial change or alteration in the cause of action or defense', the amendments sought to be made shall serve the higher interests of substantial justice, and prevent delay and equally promote the laudable objective of the rules which is to secure a just, speedy and inexpensive disposition of every action and proceeding." (citations omitted)

As discussed in the above principle, even if the cause of action of petitioner is substantially altered, it is still legally feasible for petitioner to amend its petition for review under the existing rules.

Furthermore, assuming *arguendo* that petitioner failed to comply with the abovementioned rule as respondent insists, still the nature of petitioner's "amendment" of its petition for review is in reality a supplemental petition for review, which need not comply

[72] G.R. No. 131175, August 28, 2001.

with the above rule. We quote the pertinent portion of our Resolution promulgated on March 27, 2015, thus:

> "In this case, the main purpose for filing the Amended Petition for Review is to reflect petitioner's payment of the alleged deficiency taxes subject of the instant petition which happened after the filing of the original petition for review (which is in the nature of a supplemental petition). Hence, petitioner seeks to be refunded the alleged deficiency tax assessments it paid under protest in addition to its earlier prayer to have the same deficiency tax assessments set aside or cancelled. Considering that both the claim for refund and the instant case arose from the same set of facts and issues, then both cases would necessarily rely on the same evidence, although petitioner will need to present additional evidence relating to the payment of the deficiency taxes, hence, the amendment would not substantially change the cause of action or alter the theory of the case. Thus, to avoid multiplicity of suits and in order to completely dispose of the case, the Court hereby allows the amendment of the petition for review."[73]

In light of the foregoing discussions, we hold that the amendment sought by petitioner on its petition for review is allowed by existing rules and jurisprudence.

Now, is petitioner entitled to the refund it sought before us?

Petitioner contends that it is entitled to the refund of the aggregate amount of Eighteen Million Five Hundred Sixty Seven Thousand Seven Hundred Thirty One and 69/100 (₱18,567,731.69) representing the alleged deficiency tax assessment as per the undated FDDA, together with the interest adjustment and compromise penalties up to 16 January 2015.

Respondent counters that petitioner failed to prove that it is entitled to a claim for refund on the ground that the alleged payment of the amount sought to be refunded by petitioner is not properly documented and that petitioner failed to prove the veracity of its claim.

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[73] Docket (Vol. VIII), p. 3942.

We rule in favor of petitioner.

Pertinent to the disposition of the second issue are Sections 204 and 229 of the NIRC, as amended, the pertinent portions of which are quoted hereunder, to wit:

> "**SEC. 204. Authority of the Commissioner to Compromise, Abate and Refund or Credit Taxes.** –
>
> xxx xxx xxx
>
> (C) Credit or refund taxes erroneously or illegally received or penalties imposed without authority, refund the value of internal revenue stamps when they are returned in good condition by the purchaser, and, in his discretion, redeem or change unused stamps that have been rendered unfit for use and refund their value upon proof of destruction. No credit or refund of taxes or penalties shall be allowed unless the taxpayer files in writing with the Commissioner a claim for credit or refund within two (2) years after the payment of the tax or penalty: Provided, however, That a return filed showing an overpayment shall be considered as a written claim for credit or refund."
>
> xxx xxx xxx
>
> "**SEC. 229. Recovery of Tax Erroneously or Illegally Collected.** - No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessively or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.
>
> In any case, no such suit or proceeding shall be filed after the expiration of two (2) years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment:

> Provided, however, That the Commissioner may, even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid."

Well-settled is the rule that it is incumbent upon the taxpayer to prove that it is unmistakably and clearly entitled to a tax refund, as held by the High Court in *Commissioner of Internal Revenue vs. Acesite (Philippines) Hotel Corporation, in this wise*:[74]

> "Since an action for a tax refund partakes of the nature of an exemption, which cannot be allowed unless granted in the most explicit and categorical language, it is strictly construed against the claimant who must discharge such burden convincingly."

Corollary thereto, in *Commissioner of Internal Revenue vs. Rosemarie Acosta, as represented by Virgilio A. Abogado*[75], the Supreme Court laid down the requirements for a taxpayer's claim for refund of erroneously or illegally assessed or collected tax to prosper, to wit:

> "Noteworthy, the requirements under Section 230[76] for refund claims are as follows:
>
> 1. A **written claim** for refund or tax credit must be filed by the taxpayer with the Commissioner;
> 2. The claim for refund must be a **categorical demand** for reimbursement;
> 3. The claim for refund or tax credit must be filed, or the suit or proceeding therefor must be commenced in court **within two (2) years from date of payment of the tax or penalty regardless of any supervening cause.**"

Furthermore, two requisites may be added, (4) the tax sought to be refunded are erroneously or illegally assessed or collected

[74] G.R. No. 147295, February 16, 2007.
[75] G.R. No. 154068, August 3, 2007.
[76] Now Section 229 of the NIRC, as amended.

taxes; and (5) there must be proof of payment of erroneously or illegally assessed or collected taxes.[77]

As regards the first requisite, petitioner presented its written administrative protest filed with respondent on January 21, 2015.[78] The said letter is clearly a written claim filed by petitioner with respondent. Thus, petitioner complied with the first requisite.

Going into the second requisite, a perusal of the said written administrative protest would show that petitioner requested respondent to refund or issue a tax credit certificate in the aggregate amount of ₱18,567,731.69 in its favor.[79] Clearly, the tenor of the said written protest is a categorical demand for reimbursement of the deficiency income tax, value-added tax (VAT) and compromise penalties for the year 2009. Hence, petitioner complied with the second requisite.

Anent the fifth requisite, petitioner presented eFPS Payment Form (BIR Form No. 0605)[80], eFPS Filing Reference No. 291500010261633[81] and eFPS Payment Details[82] to show that it had successfully paid the amount of ₱7,579,103.77 representing deficiency income tax, interest and compromise penalties for the year 2009; and eFPS Payment Form (BIR Form No. 0605)[83], eFPS Filing Reference No. 291500010261288[84] and eFPS Payment Details to prove that it had successfully paid[85] the amount of ₱10,988,627.92 representing the deficiency VAT, interest and compromise penalties for the year 2009. These pieces of evidence reveal that petitioner paid the aggregate amount of ₱18,567,731.69 on January 8, 2015, the amount of which pertains to the deficiency income tax, VAT, their respective interest and compromise penalties for the year 2009. Thus, petitioner complied with the fifth requisite.

As to the third requisite, petitioner paid the alleged deficiency taxes on January 8, 2015. Counting two (2) years from payment

[77] Since an action for tax refund partakes of the nature of an tax exemption, which cannot be allowed unless granted in the most explicit and categorical language, it is strictly construed against the claimant who must discharge such burden convincingly. (*South African Airways vs. Commissioner of Internal Revenue*, G.R. No. 180356, February 16, 2010)
[78] Exhibit "P-69".
[79] *Ibid.*
[80] Exhibit "P-64".
[81] Exhibit "P-64-a".
[82] Exhibit "P-64-b".
[83] Exhibit "P-64-c".
[84] Exhibit "P-64-d".
[85] Exhibit "P-64-e".

thereof, petitioner has, at most, until January 8, 2017 within which to institute its judicial claim for refund. As borne by the records of this case, petitioner filed its Motion for Leave to File Amended Petition (with Motion for Leave to Present Additional Evidence) on February 5, 2015[86], which is well within the two-year period mandated under Sections 204(C) and 229 of the NIRC, as amended. Hence, petitioner has sufficiently complied with the third requisite.

With regard to the fourth requisite, in *Muller & Phipps (Manila), Ltd. vs. The Collector of Internal Revenue*[87], the Supreme Court provided for the instances covered by Section 308 (now Section 229) of the Tax Code. Thus:

> "By its terms, the two-year limit established by said section applies only to actions to recover (1) 'any-tax alleged to have been *erroneously* or *illegally* assessed or collected', or (2) 'any penalty — collected *without authority*,' or (3) 'any sum — *wrongfully collected*'."

Black defines the term *erroneous or illegal tax* as one levied without statutory authority.[88] As discussed earlier, the formal assessment notice made by respondent against petitioner assessing the latter for deficiency income tax, value-added tax and their corresponding compromise penalties for the year 2009 is void. A void assessment bears no valid fruit.[89] Any tax collected by respondent as a consequence thereof should be refunded to petitioner. If the State expects its taxpayers to observe fairness and honesty in paying their taxes, so must it apply the same standard against itself in refunding excess payments. When it is undisputed that a taxpayer is entitled to a refund, the State should not invoke technicalities to keep money not belonging to it. No one, not even the State, should enrich oneself at the expense of another.[90]

Petitioner, having sufficiently established its clear entitlement to the tax refund sought, we deem it proper to grant the same.

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[86] Docket (Vol. VIII), pp. 3485-3493.
[87] G.R. No. L-10694, March 20, 1958.
[88] *Commissioner of Internal Revenue vs. Philippine National Bank*, G.R. No. 161997, October 25, 2005 citing *Black's Law Dictionary*, 8th Ed, pp. 1496-1497.
[89] *Samar-I Electric Cooperative vs. Commissioner of Internal Revenue*, G.R. No. 193100, December 10, 2014.
[90] *Philippine Phosphate Fertilizer Corporation vs. Commissioner of Internal Revenue*, G.R. No. 141973, June 28, 2005.

WHEREFORE, the instant Amended Petition for Review is hereby **GRANTED**. Accordingly, the assessments for deficiency income tax and value-added tax, including their respective interest and compromise penalties for the year 2009 in the total amount of Sixteen Million Two Hundred Thirty Thousand Two Hundred Ninety Six and 9/100 (₱16,230,296.09) are hereby **CANCELLED AND WITHDRAWN**. Further, respondent is hereby ordered to **REFUND** in favor of petitioner the aggregate amount of Eighteen Million Five Hundred Sixty Seven Thousand Seven Hundred Thirty One and 69/100 (₱18,567,731.69), representing petitioner's erroneously paid deficiency income tax and value-added tax assessment, inclusive of interest and surcharges, with the interest adjustment and compromise penalties up to January 16, 2015.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Acting Presiding Justice